

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	Cr. No. 05-40035-FDS
	)	
RICHARD BOTCHWAY,	)	
	)	
Defendant.	)	

**GOVERNMENT'S OPPOSITION TO DETENTION ORDER**

The United States of America, by Assistant U.S. Attorney David Hennessy, files this memorandum in opposition to Defendant Richard Botchway's motion to revoke the order detaining Defendant so that he may be released to the custody of Immigration and Customs Enforcement ("ICE"), and be deported. The government opposes this motion, and moves to defer the motion for a period not to exceed two weeks from today.

In this case, the Court has granted Defendant's motion to suppress evidence that qualifies as substantial proof of a fact material to this criminal prosecution. The government has filed a notice to appeal pursuant to 18 U.S.C. § 3731. The Office of the Solicitor General is reviewing the matter and is expected to advise whether to, in fact, pursue the appeal.

18 U.S.C. §3143(c) provides, in substance, that in such a circumstance, the Court shall treat a defendant's motion for release "in accordance with section 3142." Section 3142 sets forth the procedure and factors that apply generally to release

and detention of defendants pending trial.

In this case, the factors support continued detention. Defendant is illegally present in the United States; indeed, Defendant concedes that release would result in ICE taking custody of Defendant. Defendant has two criminal convictions for crimes involving fraud, and Defendant's criminal record indicates that he has been a fugitive as of February 17, 2000 in connection with charges of assault and reckless endangerment involving the operation of a motor vehicle under the influence of alcohol.

In addition, the government would be unfairly prejudiced by release to ICE custody at this time. Agent Cummings of ICE has advised the undersigned that if Defendant were placed in ICE custody, deportation proceedings would move quickly because of Defendant's detention status with ICE. Agent Cummings provided an estimate that deportation could occur as early as 30 days and probably within six months. If Defendant were deported, there would no longer be a "case or controversy," and the government appeal, should the Solicitor General elect to pursue an appeal, would be moot.

While Defendant correctly points out that he may have served in pretrial detention a guideline sentence, this argument overlooks the government's interest in vindicating its appellate rights, addressing an important legal issue on the scope of consent to search, obtaining a conviction, or, should

circumstances warrant, of seeking a sentence above and outside the now-advisory guideline range. Indeed, the statute authorizes the Court to impose a sentence of up to 10 years' imprisonment. See 18 U.S.C. §1029(c).

Lastly, while the Solicitor General has not made a decision on whether to appeal, as of July 28, 2006, a decision was expected imminently. The government requests a period, not to exceed two weeks from today, to advise the Court of the Solicitor General's determination.

#### **CONCLUSION**

For all these reasons, the motion for release should be denied; alternatively consideration of the motion should be deferred for a period, not to exceed two weeks from today.

Respectfully submitted,

MICHAEL J. SULLIVAN  
United States Attorney

By: /s/ David Hennessy  
David Hennessy  
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the person listed below a copy of the foregoing document by depositing in the United States mail a copy of same in an envelope bearing sufficient postage for delivery:

Keith Halpern  
4 Longfellow Place  
37<sup>th</sup> Floor  
Boston, Massachusetts 02114-2838

This 28th day of July, 2006.

/s/ David Hennessy  
David Hennessy  
Assistant U.S. Attorney